

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAWILEY GILL, et al.,  
Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,  
Defendants.Case No. [14-cv-03120-RS](#)**ORDER RE DEFENDANTS' MOTION  
FOR RELIEF FROM NON-  
DISPOSITIVE PRETRIAL ORDER OF  
MAGISTRATE JUDGE**

This is a challenge to a non-dispositive pretrial ruling issued by the assigned magistrate judge. A district court may modify a magistrate judge's ruling on a non-dispositive matter only if the order is "clearly erroneous" or "contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991).

Plaintiffs moved to "complete" the administrative record submitted by defendants in this action brought under the Administrative Procedure Act ("APA"). The primary dispute presented in the parties' briefing before the magistrate judge was whether defendants appropriately limited the record to documents related to development of the so-called "reasonably indicative" standard embodied in the broader "Functional Standard" adopted by defendant Program Manager for the Information Sharing Environment ("PM-ISE") or whether instead the record should encompass documents related to development of the "Functional Standard" as a whole. The magistrate judge effectively ruled in defendants' favor on that point, stating the record should consist of documents related to defendants' decision "to adopt a standard that is broader than 28 C.F.R. Part 23 and

1 authorizes the collection, maintenance, and dissemination of information even in the absence of  
2 reasonable suspicion of criminal activity, in conflict with 28 C.F.R. Part 23.” Plaintiffs, who  
3 argued for a broader scope, have not challenged the magistrate judge’s decision.

4 Defendants, however, challenge certain other aspects of the magistrate judge’s ruling.  
5 First, defendants contend there was no basis to require them to “revisit the administrative record to  
6 ensure its completeness.” Contrary to defendants’ argument, however, the magistrate judge did  
7 not rely improperly on mere “linguistic differences” between their certification and the standard to  
8 conclude that plaintiffs had sufficiently rebutted the presumption of completeness that attaches in  
9 matters like these. The order set out a list of twenty documents or categories of documents that, in  
10 plaintiffs’ view, the existing administrative record discloses were actually considered by the  
11 agency but were nevertheless omitted. While the order declined to rule whether any or all of those  
12 specific categories must be included, it expressly found that the certified administrative record  
13 “on its face, appears to contain less than all documents and materials directly or indirectly  
14 considered by the agency in making its decision.”

15 Additionally, the differences between defendants’ certification and the governing standard  
16 are more than “linguistic.” Despite having once amended the certification, defendants omitted any  
17 express statement that the record included materials “indirectly” considered by the agency, as the  
18 standard requires. While defendants now offer authority for the proposition that they did not need  
19 to certify the record at all, and that “inadequately worded” certifications are not necessarily fatal,  
20 they have not shown that the magistrate judge clearly erred or acted contrary to law in drawing  
21 inferences from the language of the certification to bolster the conclusion that the record may  
22 require inclusion of additional material, notwithstanding the initial presumption of completeness.


23 Defendants also complain that they should not be required, upon revisiting the record, to  
24 provide a declaration explaining their search and its results. Whether or not such a declaration is  
25 always appropriate, defendants have not shown it to be clear error or contrary to law to require one  
26 under all the circumstances here. Likewise defendants have not shown a basis for setting aside the  
27 magistrate judge’s order to provide a privilege log, particularly given their express concession that  
28

1 case law is split on the point, and that there is an “absence of any controlling authority in the Ninth  
2 Circuit.”

3 Finally, defendants object to that portion of the magistrate judge’s order requiring them to  
4 include in the administrative record documents relating to the decision to promulgate the  
5 challenged standard without public notice and comment. The parties did not brief the magistrate  
6 judge on the standard of review that would apply to plaintiffs’ claim regarding the lack of notice  
7 and comment, and that question was not before her. Nor is it appropriate to decide that issue in  
8 the context of the present motion. Nevertheless, at least at this juncture it appears likely to be a  
9 question of pure law as to whether the rule is “interpretive” or “legislative.” *See Chief Prob.*  
10 *Officers of California v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997). If so, the considerations  
11 that went into defendants’ decision not to provide notice and a comment period may be entirely  
12 irrelevant. Accordingly, enforcement of that portion of the magistrate judge’s order will be  
13 deferred, pending any further order of court.

14 In their joint case management conference statement, the parties request that defendants be  
15 given 60 days to comply with the magistrate judge’s order. Even though defendants have been  
16 relieved from complying with one aspect of that order for the time being, they will be given 60  
17 days to comply with the other provisions of the order. Upon completion of that process, the  
18 parties shall meet and confer regarding the twenty specific documents or categories of documents  
19 identified in plaintiffs’ motion, to the extent any or all of them remain in dispute in light of (1) the  
20 magistrate judge’s ruling that the scope of the record is limited to the decision “to adopt a standard  
21 that is broader than 28 C.F.R. Part 23 and authorizes the collection, maintenance, and  
22 dissemination of information even in the absence of reasonable suspicion of criminal activity, in  
23 conflict with 28 C.F.R. Part 23” (as opposed to the adoption of the Functional Standard as a  
24 whole), and (2) any further documents defendants may have included in the record upon revisiting  
25 the issue. After such meet and confer discussions, any remaining disputes regarding the twenty  
26 documents or categories, or other aspects of defendants’ compliance with the magistrate judge’s  
27 order, shall be presented to the magistrate judge for resolution.

**IT IS SO ORDERED.**

  
RICHARD SEEBORG

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